John W. Galbreath, d/b/a John W. Galbreath & Company *and* Service Employees International Union, Local 158-A, AFL-CIO, Petitioner. Case 9-RC-13867

February 3, 1983

DECISION AND ORDER REMANDING PROCEEDING TO REGIONAL DIRECTOR

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

Pursuant to authority granted it by the National Labor Relations Board under Section 3(b) of the National Labor Relations Act, as amended, a three-member panel has considered the objections to an election held on October 9, 1981,[1] and the Regional Director's report recommending disposition of same. The Board has reviewed the record in light of the exceptions and brief, and hereby adopts the Regional Director's findings and recommendations only to the extent consistent herewith.

The Regional Director recommended that Petitioner's Objection 7 be sustained,[2] that the election be set aside, and that a second election be directed. We disagree with his recommendation, and we shall remand the proceeding to the Regional Director to consider Petitioner's remaining objections.

Petitioner's Objection 7 alleges that the Employer promised to grant wage increases to employees if Petitioner were defeated in the election. In support of this objection, Petitioner submitted a campaign leaflet distributed by the Employer. After listing certain benefits, the leaflet states in pertinent part:

> All the benefits listed above are benefits the Galbreath Company has voluntarily furnished our employees. They represent additional average yearly compensation of $1,884 for each Galbreath housekeeping employee. This is almost a 19% addition to the average employee's wages.
>
> The benefits we have offered and benefit improvements still in progress are yours, not because any union "demanded" them or "got" them for you. They exist because the Galbreath Company believes in providing its employees with benefits that are equal to or better than any provided in our industry or local unit represented by the Service Employees' International Union.
>
> Your company has promised a first rate benefits program from the first. Even though we have worked together less than a year, you have already been able to see that *we have kept our promises*. You can also depend on us to do so in the future.

The Regional Director found that this case was governed by the principles of *Pacific Telephone Company*, 256 NLRB 449 (1981), which, in turn, cited favorably to *American Telecommunications Corporation, Electromechanical Division*, 249 NLRB 1135 (1980). In *Pacific Telephone*, the employer distributed to employees a letter stating that employees receive wages, hours and benefits "*equal* to those provided to" the employer's represented employees. The letter then stated that this equality was "the result of the Company's long standing policy to provide similar wages and working conditions to all employees regardless of whether employees are union represented or not." The letter concluded by noting that employees "already receive in wages and benefits *all* that you could reasonably expect a union to obtain for you," and that employees receive equal wages and benefits without having to pay union dues or be subject to union bylaws or regulations. The Board found that the leaflet constituted a promise of benefit to encourage employees to reject union representation, and that it indicated to employees the futility of selecting such representation.

The Regional Director found the facts in this proceeding to be "almost identical" to those in *Pacific Telephone*. Contrary to the Regional Director, we find that *Pacific Telephone* is distinguishable from the instant case, and for the reasons below we find the Employer's leaflet unobjectionable.

It is axiomatic that during an election campaign an employer may express his views to his employees on the issue of union representation. He may also stress to employees those benefits they have received without a union's assistance, and contrast wages and working conditions in his plant with those in unionized plants. What he may not do is make an unlawful promise of benefit to the employees to persuade them to reject the union. The Regional Director's finding that the Employer made such a promise here is in error.

It is clear that in the objected-to leaflet the Employer did no more than explain to its employees its past policy (which apparently is undenied) of providing benefits equal to or better than those provided in the "industry" or in a separate union-represented unit. It indicated that, without a union, it had previously promised a "first rate" benefits program; it had already delivered on these prom-

[1] The election was conducted pursuant to a Stipulation for Certification Upon Consent Election. The tally was 12 votes for and 15 against Petitioner, with 1 nondeterminative challenged ballot.

[2] In view of his recommendation that Objection 7 be sustained, the Regional Director found it unnecessary to consider Petitioner's Objections 1-6 and 8 and 9.

ises; and it pledged to continue to do so. But, it did *not* state it would do so only in the absence of a union. And, contrary to our dissenting colleague's unsupported claims, it did not indicate that it would refuse to bargain if Petitioner should become the bargaining representative and propose benefits that equaled or exceeded those given its unrepresented employees. Further, unlike the employer in *Pacific Telephone*, it did not tell the employees that it believed that they "already receive in wages and benefits all that you could reasonably expect a union to obtain for you." In *Pacific Telephone*, the employer stressed to employees its longstanding policy of treating union and nonunion employees equally. The Board found that this, coupled with the quote above, indicated to the employees the futility of selecting a bargaining representative. No such finding is possible on the facts here, and *American Telecommunications, supra*, is equally inapplicable.[3]

In sum, we do not think that the Employer's forthright statement of its attitude about unions, and its comments on its past track record in providing benefits, can be turned into an unlawful promise, or an inferential promise, of benefit or a statement suggesting the futility of union representation. While the line is not "glaringly bright," we do not see the Employer's comments falling on the side of impermissible statements.

Accordingly, we shall remand this proceeding to the Regional Director for consideration of Petitioner's remaining objections.

ORDER

It is hereby ordered that the above-entitled proceeding be, and it hereby is, remanded to the Regional Director for Region 9 for the purpose of preparing and issuing a supplemental report containing recommendations to the Board regarding the disposition of Petitioner's Objections 1, 2, 3, 4, 5, 6, 8, and 9. Following service of said supplemental report on the parties, the provisions of Section 102.69 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, shall be applicable.

MEMBER JENKINS, dissenting:

Contrary to my colleagues, I would adopt the Regional Director's report and direct a second election in this proceeding.

At the outset, I cannot agree with my colleagues' assertion that the leaflet did no more than "explain" the Employer's past policy regarding the distribution of benefits. The leaflet first describes that policy by stating that the Employer believes in providing employees with benefits "equal to or better than any provided in our industry or local unit represented by the Service Employees' International Union."[4] However, the leaflet then asserts that the Employer has always "promised" a first-rate benefits program, that the Employer has "kept [its] promises," and that employees "can depend on [the Employer] to do so in the future." In my view, the latter statement goes beyond a mere description of the policy and implies that the Employer intends to continue its policy whether or not employees choose union representation. I reach this conclusion in view of the plain language of the document, which stresses that "in the future" employees can depend upon the Employer's promises regarding its benefits policy, and in view of the fact that the policy remains in effect even though another unit of the Employer's employees selected union representation.

The Employer's statement of intention to continue its policy whether or not employees select union representation brings this case within the principles of *Pacific Telephone Company*, 256 NLRB 449 (1981), and *American Telecommunications Corporation, Electromechanical Division*, 249 NLRB 1135 (1980). In *American Telecommunications Corporation*, the Board found that comments made by the employer

> . . . were not strictly limited to informing [employees at one facility] that in the past [the employer] had a practice of giving the same benefits at all of its plants. In addition to this, his remarks were clearly phrased so as to indicate that [the employer] would continue to grant the same benefits at all plants in the future, regardless of which plant, if any, was unionized.[5]

Similarly, in *Pacific Telephone Company*, the Board found that the employer's agent "not only stated that the unrepresented employees received

[3] Member Hunter notes that he did not participate in either *Pacific Telephone* or *American Telecommunications*, and he intimates no view of the merits of either case. Nonetheless, as noted, he finds both cases distinguishable from the situation here.

[4] As noted by the Regional Director, Petitioner already represents a separate unit of the Employer's employees.

[5] 249 NLRB at 1136. In that case, the employer told employees at its Upland facility that, if the union obtained benefits for employees at its City of Industry facility, then the Upland employees would also receive those benefits, because the employer had always made a practice of spreading benefits equally throughout its operations. The employer further stated that, if it granted a benefit in one of its operations, the same benefit would be duplicated in the others "whether it was instigated by corporate policy or union or anything." The Board found that these comments were "clearly phrased" to indicate that the employer would continue to grant uniform benefits regardless of which plant was unionized. In this proceeding, the intention to continue the policy with or without a union is also clearly stated, since the Employer both described its policy and expressly promised to continue it "in the future," and since the Employer in fact had maintained the policy even though another unit of its employees became unionized.

benefits equal to represented employees, he also stated that employees would continue to receive such benefits whether represented by a union or not."[6] The Board concluded that "[i]t is implicit, perhaps even overt, in the employer's statements that the policy of providing the same wages, with or without a union, would be continued in the event the union won the election."[7]

Employees reasonably could draw several alternative inferences from the Employer's statement that it would continue its policy with or without a union. Initially, employees could view the statements as a promise that benefits would be granted in the event that employees rejected union representation. Thus, the statement served to reassure employees that the Employer would match any benefit increases granted to its unionized employees with corresponding increases for those employees who chose to remain unrepresented. Further, since its policy requires that unrepresented employees receive benefits equal to "or better than" those granted to unionized employees, the Employer was also stating that employees who rejected unionization might receive benefits in excess of those gained by the Employer's unionized employees.

In *Pacific Telephone Company, supra*, the Board set aside an election where an employer engaged in virtually identical conduct. In that case, the employer distributed a letter stating that the wages, hours, and benefits received by employees were "*equal* to those provided to" the employer's represented employees. The letter attributed this fact to the employer's "long standing policy to provide similar wages and working conditions to all employees regardless of whether employees are union represented or not." The Board, as noted above, viewed these remarks as a statement that employees would continue to receive such benefits whether or not they selected union representation. The Board then concluded that the letter contained a promise of benefit to encourage employees to reject the union and indicated to employees the futility of selecting a bargaining representative. I would reach a similar result in this proceeding, since the Employer's statements are virtually indistinguishable from those made in *Pacific Telephone Company*.[8] The Employer was essentially pledging that employees would receive all the benefits of union representation, and more, without a union.[9]

The Employer's promise to continue its policy with or without a union also gives rise to another reasonable inference, by raising questions concerning the Employer's attitude toward the bargaining obligation that would arise if the employees selected union representation. Thus, the Employer promised to continue its policy of providing its unrepresented employees with benefits "equal to or better than" those of represented employees. From this promise employees could reasonably conclude that, if they became unionized, the Employer would seek to maintain its policy by refusing to bargain if Petitioner proposed that their benefits exceed, or even equal, those of the Employer's remaining unrepresented employees. In this connection, the Board has already noted in *American Telecommunications Corporation* that an employer's insistence that uniform benefits continue regardless of unionization is contrary to an employer's bargaining obligation. The Board observed in that case that an employer "may not broaden the scope of the unit for negotiation by insisting that the benefits be the same at all plants." The Board further observed that, by stating in effect that it would not grant unionized employees more than it would grant unrepresented employees, the employer was stating that it had no intention of lawfully bargaining with the union.

I note finally that the Employer's leaflet is not rendered unobjectionable merely because it lacks more explicit statements. I find it sufficient that the leaflet triggers reasonable inferences regarding the Employer's response to the employees' choice in the election. In concluding that the leaflet is objectionable, I am guided in part by the Board's observations in *Turner Shoe Company, Inc. and Carmen Athletic Industries, Inc.*, 249 NLRB 144, 146 (1980):

> Communications which hover on the edge of the permissible and the unpermissible are objectionable as "[i]t is only simple justice that a person who seeks advantage from his elected use of the murky waters of double *entendre* should be held accountable therefor at the level of his audience rather than that of sophisticated tribunals, law professors, scholars of the niceties of labor law, or 'grammarians.'" [*Georgetown Dress Corporation*, 201 NLRB 102, 116 (1973).] As the Supreme Court has noted, an employer "can easily make his views known without engaging in 'brinksmanship' when it becomes all too easy to 'overstep and

[6] 256 NLRB at 449.

[7] 256 NLRB at 450.

[8] My colleagues attempt to distinguish *Pacific Telephone Company* on the grounds that the employer's letter in that case also stated that employees "already receive in wages and benefits *all* that you could reasonably expect a union to obtain for you." A close reading of that case indicates that the result was not determined by that language. Rather, the Board merely observed that that language "highlighted" the indication of futility. In my view, the Board would have reached the same result in the absence of that language, and in the absence of the letter's additional statement that employees receive equal wages without having to pay union dues.

[9] See *American Telecommunications Corporation, Electromechanical Division, supra* at 1136.

tumble [over] the brink,' *Wausau Steel Corp.* v. *N.L.R.B.*, 377 F.2d 369, 372 (7th Cir. 1967). At the least he can avoid coercive speech simply by avoiding conscious overstatements he has reason to believe will mislead his employees."

[*N.L.R.B.* v. *Gissel Packing Co.*, 395 U.S. at 620.]

I cannot join my colleagues in their departure from established precedent. Accordingly, I would adopt the Regional Director's report and direct a second election.